No. 953

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Supreme Court of the United States

OCTOBER TERM, 1942

PEOPLE OF THE STATE OF ILLINOIS, ex rel. BLANCHE DAVIDSON, CARL C. CRAMER and FRANK W. PHILLIPS,

Petitioners,

vs.

PRESTON BRADLEY, JOHN DILL, OTTO G. BEICH, HARRIETT MCINTYRE, CHARLES E. MORRIS, HELEN ROSE PEGELOW, RUSSELL GUIN, LINDELL STURGIS, JACOB E. ALSCHULER, FRANK G. THOMPSON, and JOHN A. WIELAND, Constituting THE TEACHERS COLLEGE BOARD OF THE STATE OF ILLINOIS,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

URBAN A. LAVERY,
Attorney for Petitioners.

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Defendants.

PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Blanche Davidson, Carl C. Cramer and Frank W. Phillips, by Urban A. Lavery, their attorney, respectfully pray that a Writ of Certiorari be issued by this Court to review the judgment below of the Supreme Court of Illinois, reversing (without remanding) a judgment of the Superior Court of Cook County, in that State; the latter Court, after trial, having entered a judgment in Mandamus, restoring all of the Petitioners to their positions on the Faculty of one of the Teachers Colleges of the State of Illinois.

Judgment and Opinion Below.

The Opinion of the Court below was first filed January 21, 1943. (R. 144-148) That Opinion was later modified (after Petition for Rehearing filed) at the March, 1943, Term. (R. 188-189) The modified Opinion deleted a full paragraph (R. 189) which had appeared in the original Opinion. (R. 147-148) The deleted paragraph was concerned with two points as to "parties" below, which points were vigorously objected to in the Petition for Rehearing. (R. 160-161) The Opinion as thus modified is reported in 47 N. E. (2) 93 (Advance Sheets).

Jurisdiction.

Final judgment of the Supreme Court of Illinois was entered March 15, 1943. (R. 188) That judgment, as already indicated, reversed, without remanding, the judgment of the trial court which had reinstated the Petitioners to their positions on the Faculty of the Northern Illinois State Teachers College, at DeKalb, Illinois, a State institution. (R. 148)

Thereby the judgment and opinion of the State Supreme Court construed certain laws of Illinois in such a way as to deprive the Petitioners of vested property rights, without due process of law, and also as to impair the obligation of their contracts as teachers; and in both these respects (as Petitioners contend) the judgment and opinion below has contravened the Federal Constitution. These Federal questions had not been raised, nor was there any opportunity to raise them, until the judgment of the Supreme Court of Illinois reversed the judgment of the trial court. (R. 181) Thereupon, Petitioners promptly filed a Petition for Rehearing, which among other things, (R. 180-185), challenged such judgment of reversal as contravening the Federal Constitution.

The jurisdiction of this Court is invoked under Section 237b of the Judicial Code as amended (28 U.S.C.A. Sec. 344b); and because the case of *State of Indiana* v. *Brand*, 303 U. S. 95, (which much resembles the case at bar) is believed to authorize and sustain such jurisdiction.

Summary Statement of Matters Involved.

All of the Petitioners, prior to their dismissal in June, 1941, had been for twelve years full-time members of the Faculty of the above mentioned College. (R. 2) That School is one of the five Teachers Colleges of the State of Illinois, all of which are under the control of the Defendants, the "Teachers College Board of the State of Illinois". (R. 2)

Each of the five State Normal Schools (now Teachers Colleges) in Illinois is a separate municipal corporation or "body politic," with its own separate charter or enabling Act. (R. 156) The first School was chartered in 1857, the second in 1869, two more in 1895 (one of which is the DeKalb School here involved), and the fifth in 1899. (R. 156) By the enabling Acts each School is given wide and complete powers of control and management over its own affairs, including, specifically, the appointment and regulation of its Faculty. (R. 21, 168) Because of the fact that these Teachers Colleges have their own separate charters and because they charge tuition fees (R. 169), and for other reasons, they are not a part of the State "Common School" System, (*as the State Court in its Opinion holds by clear implication*) but are in a statutory category by themselves. (R. 167)

The defendant Board is a statutory Board of Education created by the so-called Civil Administrative Code of Illinois (Ill. Rev. Stat. Ch. 127, Sec. 5, *et seq.*) and is charged with the control and management of all the State Teachers Colleges. (R. 2)

In July, 1941, each of the Petitioners was served with summary notice of dismissal by the President of the DeKalb School (R. 12) and each dismissal was approved without discussion but by a divided vote, by the defendant Board (R. 17). No advance notice whatever was given any of the Petitioners, no "hearing" of any kind was afforded them, and no opportunity for defense whatever was given them, either by the School authorities or by the Defendant Board. (R. 67 and 108)

The Petitioners brought Mandamus in the Superior Court of Cook County, asking to be restored to their positions on the ground that they were illegally dismissed. (R. 1-35) The trial court, after listening to the testimony of many witnesses, including the three Petitioners and the President of the School (R. 57-114), ordered that each of the Petitioners be restored to his position, "*until such time as his employment and contract and tenure as such member of the Faculty may be legally and lawfully terminated.*" (R. 119, 124, 130)

The Defendants appealed and (as already stated) the Supreme Court of Illinois, on January 21, 1943, reversed that judgment and denied the Petitioners any relief whatever. (R. 148)

The Petitioners, on February 15, 1943, filed a Petition for Rehearing. (R. 151-187) The Supreme Court of Illinois, on March 15, 1943, directed that such Petition for Rehearing be "stricken in violation of rules," without, however, specifying any rule violated. (R. 188)

The Petition for Rehearing strongly urged (as already suggested) that the judgment and Opinion below, *for the first time,* raised and injected into the case the Federal questions on which relief is sought in this Court. (R. 180-185)

In spite of the fact that the Petition for Rehearing was "stricken," the Court below (as already indicated) thereafter proceeded to modify its Opinion in two important respects, in accordance with certain objections raised in that Petition. (R. 180-185)

Constitutional Provisions, Statutes and Administrative Rules.

A.

Constitutional Provisions.

Because of their bearing on the case the following provisions of the Federal Constitution are here set out:

Art. I, Sec. 10, Clause 1. "No State shall . . . pass any . . . law impairing the obligation of contracts . . ."

Amendment 14, Sec. 1. ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

B.

Statutes.

Because of their primary importance in this case, the following two provisions of the DeKalb School Enabling Act are particularly set out. The first guarantees the right of "hearing" before any member of the School Faculty can be lawfully dismissed, and is as follows:

"Sec. 12. *Trustees' Powers.* The said Board of Trustees" (now the Teachers College Board of Illinois) "shall appoint instructors, together with such

other officers as may be required in said Normal School, fix their respective salaries, and prescribe their several duties. *They shall also have power to remove any of them for proper cause after having given ten days' notice of any charge which may be duly presented, and reasonable opportunity for defense. . . .*"[1] (Italics added.) (Ill. Rev. Stat., Ch. 122, Sec. 462.)

The second statutory provision in the DeKalb School Act which is equally controlling in this case has to do with the "Contract Powers" of the School, and the employment and "regulation" of teachers, and is as follows:

"Sec. 1. *Organization—Corporate Powers.* A body politic and corporate is hereby created by the name of the Northern Illinois State Normal School, to have perpetual succession *with power to contract and be contracted with,* to sue and be sued, to plead and be impleaded, to receive by any legal mode or transfer or conveyance property of any description and to have and hold and enjoy the same; also to make and use a corporate seal with power to break or change the same, *and adopt by-laws, rules and regulations for the government of its members, official agents, and employees:* Provided, such by-laws shall not conflict with the Constitution of the United States or of this State."[2] (Italics added.) (Ill. Rev. Stat., Ch. 122, Sec. 451.)

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1. An almost identical provision is found in all five Normal School Charters, the last four having been copied from the first Normal School Act of 1857. That Act itself seems to have borrowed this idea of "hearing" from the earlier Normal School Acts of Pennsylvania and other Eastern States. The fact is, this provision requiring "hearing" and an opportunity for defense before Normal School Teachers may be dismissed, is common to many of the States of the Union. The Court below by-passed this statute by merely saying:

> "Such provision for removal for cause, if still in effect, doubtless was intended to apply to removals during the course of a school year." (R. 147)

2. It will be noted that there is no limitation prohibiting continuing tenure for teachers or compelling "annual" contracts for teachers, as the Supreme Court of Illinois held was the law of this case (R. 146-147).

C.

Administrative Rules, etc.

Under the statute last above quoted, as well as under the Civil Administrative Code of Illinois (*supra*), the defendant Board has power to make "by-laws, rules and regulations for the government" of the Teachers Colleges. Acting under this express power the defendant Board, long before this controversy arose, had adopted sundry "Rules", which have the force of law so far as these Schools are concerned. Several of these Rules are so pertinent here that they deserve to be set out. The first of these Rules has to do specifically with "Security of Tenure" and is as follows:

> "*Rule 11.* The classification of a teacher according to the provisions of this schedule shall carry with it *security of tenure* during his continuance of satisfactory service and professional growth, unless the reorganization of the work of the School makes it necessary to discontinue the position which he holds."[3]

The second Rule of the defendant Board which is pertinent to this Petition specifically authorizes *three-year contracts* for teachers in certain cases. This Rule was adopted at the same meeting and is published in the same Official Proceedings as the Rule last above quoted, and is as follows:

> "*Rule 13. Leave of Absence to Continue Education*: One teacher from the faculty of each Teachers

3. The set of Rules, of which Rule 11 was one, was formally adopted by the defendant Board at its meeting on October 15, 1928 and is printed in an official publication of the State, entitled as follows:

"Proceedings of
The Normal School Board of
The State of Illinois"
"(*Printed by Authority of the State of Illinois.*)"

College for every twenty-five members or major fraction thereof, may be granted a year's leave of absence on half pay for the purpose of attending some institution of higher learning, provided that teacher shall have already taught five years in the Teachers College and that the amount of the allowance shall not exceed $1,500. Said teacher, however, shall agree to teach at least two more years in the same faculty, and give a note for this amount with proper security, same to be cancelled at the end of the two years of service required. The leave of absence must be applied for at the April meeting of the board."[4]

"Emeritus Service Plan."

A third set of Rules which the Defendant Board formally adopted (in 1934) is also pertinent here, being the so-called "Emeritus Service Plan" for the Teachers Colleges. This "Plan" is set out in full in the Transcript. (R. 24-25) Two sections of this Plan are as follows:

> *"Section 1.* The mandatory retirement age for persons in the employ of the Normal School Board as Presidents or as teachers in the State Teachers Colleges shall be seventy-five years. Retirement may be permissive at the age of sixty-five."
>
> * * *

---

4. Attorney General's Opinion. Shortly after the adoption of "Rule 13" last above set out, the defendant Board asked for and secured an Opinion of the then Attorney General of the State as to the legality of that Rule. The official Attorney General's Opinion, dated May 17, 1929, (*Opinions of Attorney General of Illinois 1929*, p. 246) approving the legality of this Rule 13, said in part:

> "The Normal School Board in making the above Rule or resolution, no doubt had in mind that by the granting of leave of absence to the teachers mentioned in such rule the Normal Schools would obtain an improvement in the qualification of the teachers, and that would by reason of the better qualification of the teacher and the improved instruction, be of benefit to the State. * * *
>
> I am therefore of the opinion that the rule adopted by the said Normal School Board is valid."

It will be noted that the present Attorney General of Illinois, who was Counsel for the Defendants in the trial Court and in the State Supreme Court, succeeded in getting the latter Court to reverse (in effect) both of the above quoted Rules, and the above Attorney General's Opinion.

> "*Section 4.* A teacher who has served thirty-five years in public education, twenty years of which must have been in the State Teachers Colleges of Illinois, shall be eligible to receive an annual emeritus salary."[5]

The necessary and implicit effect of this Plan was (like the two foregoing Rules) to provide a *guaranty of continuing service* to all teachers in the Teachers Colleges. Like the above two Rules this Plan also obviously involves *an administrative construction* of the Illinois Statutes under which a vested right to continuing tenure by the teachers is recognized and approved.

Reasons Relied on for Allowance of Writ.

The necessary effect of the Opinion below was *first* to give such a narrow and restrictive construction to the above cited Statutes as to nullify them so far as the rights of these Petitioners are concerned; and *second* to strike down altogether the Administrative Rules of the defendant Board above set out. In all these particulars the judgment of the State Court has violated both of the Federal Constitution provisions above quoted.

Questions Presented.

The Record here presents the following principal questions:

1. Whether these teachers were not deprived of property rights without due process of law, by reason of their dismissal without any hearing or opportunity for defense.
2. Whether such dismissal did not result in the impairment and destruction of vested contract rights and obligations.

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5. The Transcript (R. 24) shows that this Plan was formally adopted by the defendant Board at its meeting on November 19, 1934.

3. Whether the judgment of the Court below did not destroy and upset a long-standing construction of the laws of Illinois under which important rights of the Petitioners had accrued and become vested, with the result that Petitioners have been denied due process of law in violation of the Fourteenth Amendment.

4. Whether such upsetting of the long-standing construction of the laws of Illinois (by the judgment below) has not impaired the vested property and contract rights of the Petitioners in violation of the so-called "Contract Clause" of the Federal Constitution.

5. Whether the denial to Petitioners by the Court below of any right of hearing or opportunity for defense before dismissal, as guaranteed by the State law, was not a violation of the Federal Constitution, both as regards impairment of contract, and as a denial of due process.

6. Whether the judgment of the Court below did not operate to forfeit vested pension rights of the Petitioners under the laws of Illinois, in violation of the due process clause of the Fourteenth Amendment.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION.

SUMMARY OF ARGUMENT.

This Brief is concerned with three general subject-matters:

Part I.

A discussion of the Brand case decided by this Court in 1938 (State of Indiana v. Brand, 303 U.S. 95), because that case sets a pattern that strongly suggests that the Court should also review the case at bar.

Part II.

A discussion of some of the important fact-situations in this case, since a good understanding of the facts is particularly desirable in the consideration of this Petition.

Part III.

An Argument on the Law, pointing out how the Constitutional Rights of the Petitioners have been violated by the judgment of the reviewing Court.

ERRORS ASSIGNED.

Under Part III ante, the discussion of the law in this case is concerned with the following major points, in which, it is believed, reversible error occurred in the judgment and Opinion of the State Court:

A. The judgment below in refusing Petitioners a right to "hearing" before dismissal (as guaranteed by the DeKalb School enabling Act) amounts to a denial of due process of law, contrary to the Fourteenth Amendment.

B. The refusal of the reviewing Court below to recognize and enforce the statutory "contract powers" of the DeKalb School, in the employment of teachers, results in a deprivation of the property rights of the Petitioners in violation of the Fourteenth Amendment.

C. The holding of the reviewing Court below that the "term of employment" of the Petitioners, as teachers, was limited to "one year," constitutes an impairment of Petitioners' contracts in violation of the "Contract" Clause of the Federal Constitution.

D. The refusal of the reviewing Court below to recognize and give validity to the Rules and customs of the defendant Board, and of the DeKalb School, concerning "continuing tenure" for teachers, constitutes an impairment of Petitioners' contract rights in violation of the last-mentioned provision of the Federal Constitution.

E. The judgment and Opinion below runs counter to the construction of the Illinois laws as determined by prior decisions and by Administrative Rulings, and thereby it deprives Petitioners of their vested property rights, in violation of the above-mentioned provisions of the Federal Constitution.

ARGUMENT.

Part I.

Basis for Jurisdiction. (The Brand Case[1])

As already indicated, the *Brand* case, *supra,* (303 U. S. 95) which arose in Indiana and was decided by this Court five years ago, is a strong encouragement to the Petitioners here to seek relief in this Court.

That case, like the one at bar, involved important and unsettled questions concerning the law of academic tenure for teachers. It need hardly be stated that it has become a leading case on the law of education. There, as here, a school board had ousted a teacher and the teacher brought Mandamus, seeking reinstatement. There, as here, the teacher had taught many years in the particular school and claimed vested rights to continuing tenure. There as here the State Court held, first, that the teacher had *"no substantial right"* to be continued in her position; and second, that *"teachers' contracts are made for one year only."*[2]

In the *Brand* case, as here, a Petition for Rehearing was filed which challenged the judgment below on the ground that it, *for the first time,* interjected the same Federal questions which are raised in this case. In both cases, however, the State Court stood by its judgment, denying all relief to the teachers involved.

The teacher in the *Brand* case, as here, thereupon sought final relief in this Court. This Court granted Certiorari

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[1] The Petition for Rehearing below contained a vigorous protest against the Opinion of the State Supreme Court on the ground (among others) that it was in direct conflict with the Brand case, and therefore in violation of the Federal Constitution. We think this Court will be interested in the discussion there given. (R. 161 and 183)

[2] In this Brief where italics are used they have been added, unless otherwise indicated.

and thereafter reversed the judgment of the Supreme Court of Indiana. The first point considered by this Court in the *Brand* case concerned the right of the teacher to ask this Court to intervene. In upholding that right the Court said, among other things:

> "The Court may examine the opinion of the State Court to ascertain whether a Federal question was raised and decided.
>
> "Where a State Court does not decide against a petitioner or appellant *upon an independent state ground,* but deeming the Federal question to be before it, actually entertains and decides that question adversely to the Federal right asserted, this Court has jurisdiction to review the judgment, if as here it is a final judgment."

That language fits exactly the case here at bar. The *Brand* case is therefore a clear holding that, as a matter of procedure, the Petitioners here are entitled to seek relief in this Court.

On the merits this Court held that the teacher in the *Brand* case *"had a vested property right in her indefinite contract which may not be impaired under the (Federal) Constitution."* This Court further held that the decision of the Supreme Court of Indiana *"runs counter to the policy"* of the State statute there involved; and also that the decision of the State Court had substantially reversed "earlier decisions construing its provisions."

Thus we have, in the language of this Court in the *Brand* case, three of the major complaints, on Federal grounds, against the State Court decision in the case at bar, namely:

> That the Petitioners here "had a vested property right in (their) indefinite contracts" which may not be impaired under the Federal Constitution.
>
> That the decision below "runs counter to the policy" of the Illinois statutes concerning the Teachers Col-

leges, in such a way as to violate the Federal Constitution.

That such decision also "runs counter . . . to the earlier decisions construing" the Illinois Statutes—as those Statutes have been interpreted by many years of Administrative construction—and thus violates the Federal Constitution.

This outline of the *Brand* case will suggest why we strongly urge that, on the merits, it would be in order for the Court to grant Certiorari in the case at bar.

Part II.

Important Fact-Situations in the Case.

In order more clearly to present the Federal questions involved in this case, there is here given a summarized analysis of some of its more important fact-situations. The record shows in forceful fashion that it was some of these matters that influenced the trial court to grant relief to the Petitioners here. (R. 67 and 108)

A. *Dismissal without Hearing.* The point about this case which shocks both justice and morals is the fact that no charges were ever lodged against the Petitioners, either directly or indirectly, before their dismissal; and the further fact that they were given no hearing or opportunity of defense whatever, although each of them had served for 12 years as a permanent member of the School Faculty.

The ruthless methods employed in dismissing these three Petitioners was brought out at the trial by Counsel for Defendants themselves, on examination of the President of the DeKalb School (R. 107-108):

> "Mr. Wines: Now President Adams I want to ask you what the customary method of dismissing members of the faculty there has been, for as long a time as you know anything about it?
>
> "[Colloquy between Court and Counsel.]
>
> "The Witness: In our institution the policy I have followed is to take the case to the Committee of our College and discuss the case with the Committee, stating why I think the person's services should be discontinued. * * * After the Committee reports on the *feasibility* (*sic*) I then present it to the [Defendant] Board. Then I notify the teacher of the action of the Board.
>
> "The Court: *She is through then without having heard anything about it?*
>
> "The Witness: Yes. If she hasn't heard about it in between. * * *
>
> "The Court: I want to be set right. If you can go to a Committee and talk it over as to what should be done about a certain teacher, and then when you arrive at your conclusion, you go to the Board and the Board votes on it, and discharges the teacher without having heard from the teacher, without getting the teacher to tell her side of the story, I say that ought to be discontinued, whether it is universally practiced or not.
>
> "The Witness: I think when action of this sort has been taken it is generally known by *other members* of the faculty."

Comment on such tactics and methods is unnecessary. We think the trial Court rightly appraised such conduct.

B. *Employment Contracts of Petitioners.* The Petitioners here all joined the faculty of the DeKalb School in the Fall of 1929. They came there highly recommended, as shown by Defendants' own records[3]. (R. 6, 9, 10) Their dismissals after long years of exemplary service came like a bolt from the sky; indeed, the fact of their dismissal was intended by the President of the School to be kept secret "until after commencement". (R. 94)

The testimony of Petitioner Phillips as to the terms of his employment contract at the time of joining the School is typical of all the Petitioners (R. 73-74):

> "I first discussed preliminary the matters of my association with the Normal School with J. C. Brown who was President of the School at that time [1929]. He called me long-distance at Freeport, Illinois and asked me to come to see him, which I did. I was not anxious for the position because I had one of the best [School] Superintendencies [in the State]. It was necessary for Mr. Brown to 'sell' me the idea. He did so by assuring me that I would become a regular member of the Faculty with all the considerations due such a member. He assured me that after three years' probation I could qualify under the 'Emeritus Plan' of the institution. Everything he said was to persuade me to take the position on account of its permanency, good salary and so forth."

It should be particularly noted that the Opinion of the reviewing Court below concedes that such a contract was made with each of the Petitioners and that after three years they "would come under the status of a permanent member of the Faculty". (R. 165)

---

[3] The DeKalb School Catalog for 1940-41 was introduced in evidence by Petitioners. (R. 61) It shows a list of more than 100 members of the College Faculty. The educational background of each Faculty member is there set out. The records of Petitioners there given show that they were regularly held out as among the best educated and most important members of the School Faculty. (R. 62, 63, 64, 65, 66)

After relying on such contracts of employment for twelve years, the Petitioners have now been ousted from their positions in summary fashion, and are told by the Opinion below that their employment contracts are illegal and void; and forsooth for the bare reason that their contracts were (in the language of the Opinion below) "the unauthorized act of a school official". (R. 148)

Here again comment on these *facts* seems unnecessary. We shall discuss later, the legal aspects of the Opinion of the reviewing Court concerning this point of the employment contracts of the Petitioners.

C. *Irreparable Damage to Petitioners.* The evidence shows that each of the Petitioners have suffered irreparable damage as a result of their summary dismissals. The sworn Petition for Mandamus filed in the trial Court, under a paragraph entitled *Professional Injuries*, charged that (R. 32-33):

> "The general professional reputation of your Petitioners * * * and their standing in what may be called the Teaching World have been put under a cloud and have been smirched * * * Their chances and opportunities * * * for re-employment on the Faculties of other Schools and Colleges have been substantially reduced and in large measure destroyed by the questionable and unexplained methods * * * of their dismissals."

In support of these charges, Miss Davidson testified at that trial (R. 61):

> "I have attempted to seek other employment in the interval. I have filed applications with the so-called Teachers Employment Agencies. I have had no success. I have had no tenders or proposals made to me as a result of those applications."

The testimony of Petitioner Cramer on this point was to the same effect. (R. 72)

It is common knowledge that a teacher who has been dismissed under such circumstances finds himself practically "black-balled" everywhere else, until the cloud on his reputation has been removed. The future professional careers of these Petitioners can now be saved only through the Courts of Justice.

D. *"Lettres de cachet."* In every law suit, as in every military battle, there is some one fact that stands out as the typical incident of the event. Looking backward the historian, as well as the student of the law, can always say: *"There* was the high point of the struggle." In this case that incident involves what may be called the *"lettres de cachet"* which the President of the School demanded be signed by Petitioners Davidson and Cramer, as the price of holding their jobs for one more year. (R. 67 and 72) Those letters were obviously designed as *forced resignations,* to take effect at the end of one year with the dire possibility of even earlier decapitation. When these two teachers refused to sign on the dotted line, that instrument which the President of the School euphemistically called *"an express agreement for cooperation or immediate termination of contract"* (R. 95), they promptly had their academic heads cut off. By his demand for such a letter, the President of the DeKalb School showed his true feather. Neither statutory rights, nor principles of academic tenure in education meant anything to him, when he wanted his way.

E. *"Liquidating the Opposition."* It was brought out by Counsel for the Defendant at the trial that the President of the DeKalb School in 1939 was himself on the verge of dismissal. (R. 82) When he had ridden out that storm, he promptly set out on a campaign to get rid of all teachers who would not bend the knee. He determined to "liquidate the opposition," and accordingly started out on a plan of rather wholesale dismissal of teachers.

There was no evidence that the Petitioners here had been involved in the proceedings against him. But they were independent and strong members of the Faculty, and so he exercised his arbitrary power of "hiring and firing" to get rid of them, when they would not submit to his written demand for "cooperation." The Minutes of the defendant Board when these teachers were dismissed (at the two meetings of May 19, 1941, and July 9, 1941) show a rather droll and cynical acquiescence with the recommendation of the School President, and also an utter indifference to Educational standards and to the personal fate of these Petitioners. (R. 14-15 and 17)

F. *"Standards of American Association of University Professors."* The evidence shows that the summary procedure adopted in dismissing the Petitioners was in conflict not only with the Statutory and Administrative provisions already discussed (see *ante* pp. 5 to 8), but also was in clear violation of the accepted custom and practice as to academic freedom and tenure which had long prevailed in the DeKalb School, and in the Teachers Colleges generally. This is clearly shown by the "Security of Tenure" Rule of 1929, and the "Emeritus Service Plan" of 1934, adopted by the defendant Board, which are set out in this Petition. (*Ante pp.* 7, 8) The evidence also shows

(R. 83-85) that a few months after these three teachers were dismissed, an official Committee of the five Teachers Colleges (which had previously been created to put the whole subject of "Standards" of academic freedom and tenure on a formal and official basis) brought in a published Report. The Petitioners introduced this printed Report at the trial. (R. 83-90) That Report formally approved the so-called "Standards of the American Association of University Professors on Academic Freedom and Tenure." It is commonly known in Educational circles that those "Standards" have, during the last two decades, been widely accepted by the Colleges and Universities throughout the United States.[6]

We need hardly say that the dismissal of these teachers was in direct violation of those generally accepted "Standards," first, because there was no *hearing*, and second, because there was no recognition whatever of the right of *continuing tenure*.

G. *Pension Rights Destroyed.* The evidence shows that Miss Davidson, who had been Dean of Women at the DeKalb School for 12 years, at a salary of $3600, had taught in the public school system for 27 years (R. 70), and for a large part of that time had contributed to the Teachers Pension System. Under the Teachers Pension Act which was in force at the time of her dismissal, she would eventually be entitled to a rather small pension of

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[6] The Courts have taken judicial notice of that Association and its "Standards." Thus in *Cobb* v. *Howard University*, 106 Fed. (2) 860, in a case arising in the District of Columbia, the Court had before it a case involving academic tenure in that school. In a footnote to the opinion the reviewing Court says:

> "It is common knowledge that teachers in seeking academic connections at the Collegiate level lay increasingly greater emphasis upon provisions for tenure and retirement. The American Association of University Professors, composed on January 1, 1939 of 14591 members devotes much of its effort toward promotion and protection of teachers rights of tenure."

$33 per month. (R. 69-70) But under a new Pension Act (Ill. Rev. Stat. chap. 144, sec. 79, *et seq.*) which went into effect in the summer of 1941—*only a few weeks after her dismissal*—Miss Davidson would have been entitled, on retirement, to a pension of $150 per month. (R. 31)

The same general situation exists with respect to the deprivation of pension rights of Petitioner Cramer. (R. 31-32)

We have here, therefore, a situation where the pension rights of these two Petitioners have been grievously damaged and destroyed by the judgment and Opinion below. This pension situation alone constitutes such a serious deprivation of property rights as to justify, and we believe to require, the reversal of the judgment of the State Court.

H. *Minority Opposition on Defendant Board.* One of the redeeming features in this case (besides the forthright action and decision of the trial court) is the opposition which the record shows a *minority* of the defendant Board registered in the Minutes to the dismissal of the Petitioners. (R. 17) One of the two protesting members of the defendant Board was Mr. Jacob Alschuler, a widely-known lawyer of Aurora, Illinois. He lives within a few miles of the DeKalb School and (as we urged below) must be assumed to be the member of the Board most familiar with the conditions surrounding this case, *at the School.* Mr. Alschuler appeared as a witness and testified strongly in support of the Petitioners. We think this Court might be interested in his summarized testimony. (R. 79-82) Mr. Alschuler also filed a separate Answer at the trial, formally admitting that Petitioners were entitled to the relief they asked. (R. 41-42)

I. *The Rule of "Fair Play."* We might continue this recital of striking facts in this case, but enough of the story has been given to show how the stage was set for the ouster of these Petitioners from the posts on the Faculty of the DeKalb School where they had spent a considerable part of the best years of their professional lives. We end this part of our Brief with this suggestion:

Is it not a little strange that the reviewing Court, even though it felt compelled under the law to uphold the ouster of these teachers, had not a single word of criticism about the methods by which their ouster was achieved? Can it be that the reviewing Court felt none of the repugnance for the conduct of the School authorities, brought out by the evidence, which the trial court obviously felt? Does not the fact of the entire absence from the Opinion below of a single suggestion or word of disapproval for such methods in public Education cast a shadow of its own in this case?

This Court has recently spoken in plain terms on the duty of Administrative Boards and the Courts alike, in dealing with the "liberty and property of the citizen" where a *hearing* is required. In the leading case of *Morgan* v. *United States,* 304 U. S. 1, this Court has laid down a rule for such proceedings which has since become embedded in our law, and is known as the Rule of Fair Play. In construing the Packers and Stockyards Act, which required the Secretary of Agriculture to proceed only after "full hearing" and in reversing the cause for the reason that such guaranty had not been complied with, this Court said, speaking through Chief Justice Hughes:

> ". . . In administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. They demand 'a fair and open hearing'—essential alike to the legal validity of the

> administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'."

That doctrine has recently been applied to the protection of teachers from summary and arbitrary dismissal. The Supreme Court of Minnesota in January of 1943 had before it a case involving the dismissal of several teachers by the School Board of the City of Duluth. *State ex rel. Ging* v. *Board of Education,* 7 N. W. (2) 544. In reversing the School Board, which had dismissed the teachers (and the trial court which had not fully protected their rights) the Minnesota Court referred to the *Morgan* case, *supra,* and said:

> "The least the Courts can do is to hold high the torch of 'fair play' which the highest Court of the land has made the guiding light to administrative justice. *Morgan* v. *United States,* 304 U. S. 1."

That rule should have been applied in the case at bar; and if that had been done the judgment of the trial court would have been affirmed instead of reversed.

Part III.

Constitutional Rights of Petitioners Violated.

Errors Assigned.

Our discussion of the law of this case, on the merits, is concerned with the following major points:

A. The judgment below in refusing Petitioners a right to "hearing" before dismissal (as guaranteed by the DeKalb School enabling Act) amounted to a denial of due process of law, contrary to the Fourteenth Amendment.

B. The refusal of the reviewing Court below to recognize and enforce the statutory "contract powers"

of the DeKalb School, in the employment of teachers, resulted in a deprivation of the property rights of the Petitioners in violation of the Fourteenth Amendment.

C. The holding of the reviewing Court below that the "term of employment" of the Petitioners, as teachers, was limited to "one year," constituted an impairment of Petitioners' contracts in violation of the "Contract" Clause of the Federal Constitution.

D. The refusal of the reviewing Court below to recognize and give validity to the Rules and customs of the defendant Board, and of the DeKalb School, concerning "continuing tenure" for teachers, constituted an impairment of Petitioners' contract rights in violation of the last-mentioned provision of the Federal Constitution.

E. The judgment and Opinion below runs counter to the construction of the Illinois laws as determined by prior decisions and Administrative Rulings, and thereby other particulars in so far as it deprived Petitioners of their vested property rights, in violation of both of the above mentioned provisions of the Federal Constitution.

A. Statutory Guarantee of "Hearing," etc.[7]

We have seen that by virtue of repeated statutory provisions in Illinois the teachers in the Normal Schools of the State (now the Teachers Colleges), when once permanently appointed to the Faculty, could only be dismissed "for proper cause" and after "hearing" and "reasonable opportunity for defense." This provision in the DeKalb enabling Act is as follows:

"Sec. 12. *Trustee's Powers.* The said Board of Trustees" (now the Teachers College Board of Illinois)

[7] This particular point was vigorously stressed in our Petition for Rehearing below. (R. 163)

> "shall appoint instructors, together with such other officers as may be required in said Normal School, fix their respective salaries, and prescribe their several duties. *They shall also have power to remove any of them for proper cause after having given ten days' notice of any charge which may be duly presented, and reasonable opportunity for defense.*"

This idea of an implicit guaranty of *continuing tenure* for Normal School teachers came into the law of Illinois with the establishment of the first Normal School in 1857. (R. 156) A similar provision was specifically incorporated by the Legislature in each of the five Normal School enabling Acts. Here then is a provision of the law of Illinois which has stood unchallenged for 85 years. It has now, suddenly, and after vested rights have become established under it, been emasculated and, in effect, repealed by the judgment and Opinion below. And yet all that the State Court says in justification of its refusal to apply the above quoted statute is:

> "* * * Such a provision for removal for cause, if still in effect, doubtless was intended to apply to removals during the course of a school year." (R. 147)

The first thing to be said about this language of the Court, which strongly questions whether this provision is "still in effect" is this: We cited and quoted in our main Brief below, a recent Act of the Illinois Legislature,[8] which specifically *reserved from repeal* the above quoted section from the DeKalb School enabling Act. Here then we have the Legislature of the State, just two years before this controversy arose, showing a clear intent to preserve and enforce this provision as to "hearing" before dismissal

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[8] Laws of Illinois, 1939, p. 1167; not in the Revised Statutes of Illinois, because it is purely a repealing act.
The corresponding sections in each of the other four Normal School enabling Acts were likewise specifically reserved from repeal.
See note on this point in our Petition for Rehearing below. (R. 163)

of teachers. And yet the Opinion below has now put into the State Reports a definite challenge as to whether this section of the Statutes of Illinois "is still in effect."

The second thing to be said about the above-quoted language from the Opinion below is that the interpretation of the wording used in the statute is obviously a tortured construction of the Legislative language. Is it to be assumed that the Legislature repeated this guaranty of "hearing" in each of the five Normal School Acts for the narrow purpose of having it apply only "during the course of a school year"? The only logical interpretation of the Legislative intent is that some measure of protection *against arbitrary and dictatorial action* was thought desirable for teachers in the Normal Schools. In other words, the Legislature clearly intended to protect teachers against just such treatment as these Petitioners got.

The language of the Opinion of the reviewing Court below on this point of notice and "hearing" is a covert invitation to all Educational Administrators in Illinois to exercise despotic power over their Faculties.

In our Brief before the State Court we cited and discussed many cases on this point of "hearing" before dismissal. If Certiorari should be granted by this Court we will argue them again in the fashion they deserve.

B. Power of Contracting with Teachers.

The provision concerning the Contract Powers of the DeKalb School is set out in this Petition on page 6 and is, in part, as follows:

> "*Section 1.* A body politic and corporate is hereby created by the name of the Northern Illinois Normal

> School, to have perpetual succession, with power to contract and be contracted with, to sue and be sued, to plead and be impleaded" etc. (Rev. Stat. of Ill., Ch. 122, Sec. 451.)

We have seen that the State Court frankly concedes that when these Petitioners were first employed they were "assured by the President of the School" that after a probationary period of three years "they would come under the status of permanent members of the Faculty." (R. 145) The State Court, however, holds these contracts were illegal and void because such contract rights, in the language of the Court, "cannot be acquired * * * by the unauthorized act of a school official." (R. 148) The reason as given in the Opinion below is that—

> "It has long been the law that a public-school board, under authority to appoint teachers and fix their salaries, may not employ them for a tenure longer than the current school year." (R. 146)

We reluctantly say that the reviewing Court, for some unexplained reason, seized on this point of *annual contracts* for teachers, as the chief basis for its decision. It is true that two early decisions in Illinois concerning the Common Schools, decided in 1877 and 1879, (cited in the Opinion below), contain language that may be cited *arguendo* for such a proposition. But those cases are hoary with age and are utterly out of line today, *even for the Common Schools.* Moreover, those early cases (*Stevenson* v. *School Directors,* 87 Ill. 255, and *Davis* v. *School Directors,* 92 Ill. 293) were each of them construing a *School Tax law* which involved *annual* tax levies for school teachers' pay. The Court in those cases was *not* construing (and was *not concerned with*) the general power of school boards to contract with teachers, as the Opinion below would have us assume.

Finally, it should be said that there is not a single case in the books in Illinois that suggests such a doctrine of

"one year" contracts applies to the Teachers Colleges, each of which has its own statutory contract powers.

While there are no cases in Illinois on the precise point of teachers' contracts in the Teachers College, there are four cases (*Board of Education* v. *Greenbaum & Sons*, 39 Ill. 609, 1864; *Burr* v. *City of Carbondale*, 76 Ill. 455, 1874; *Board of Ed.* v. *Bakewell*, 122 Ill. 339, 1887; and *Boehm* v. *State Treasurer*, 182 Ill. 154, 1899) *all* of which are *Normal School* cases and all of which construe the specific statutory language above quoted. All of these cases hold that the *general contract* powers of these Schools is practically unlimited, except by the wording of the statute itself.

As a matter of fact, so far as power to make binding contracts with teachers is concerned, the Teachers Colleges are, as we have seen, in an entirely different category from the Common Schools. The Teachers Colleges are in practically the same general category, both from a statutory basis and an educational basis, as the State University. Strangely enough, the reviewing Court at the same term at which it decided the case at bar also decided an important case involving the employment contract powers of the University of Illinois (*People ex rel. University* v. *Barrett, Attorney General*, 46 N. E. (2) 951) which is implicitly in conflict with the Opinion in the case at bar.[9]

The realistic fact is that *continuing contracts* with teachers have been made by all of the Normal Schools for many years. The uncontradicted testimony at the trial showed that at the DeKalb School "Permanent tenure came in under Dr. Cooke's administration—about 1909". (R. 77) It is also a fact (as shown by the "Rules" of the defendant Board, set forth at pages 7 to 9 of this Petition) that the defendant Board has itself,

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[9] We stressed this point of conflict between the two Opinions in our Petition for Rehearing below. We suggest that what we there say is true and convincing and that this Court will find it of interest. (R. 177-179)

for a period of at least fifteen years, authorized and approved "security of tenure" for teachers. That is the language used by the Board in its "Rule 11" adopted in 1928. (See this Petition, p. 7)

In spite of this clear evidence of a traditional construction of the Normal School enabling Acts, stretching over more than a generation, whereby *continuing contracts* were regularly made, and in spite of the broadest kind of contract-power granted to these Schools in the wording of their several enabling Acts, the reviewing Court below holds such contracts void. To achieve this result, it uses the curt and extraordinary language about "one year" contracts quoted above.

It is an old saw that "close cases make bad law." But this is not even a close case. The implicit result of the Opinion below on this point of "teachers' contracts" not only does grave violence to the vested rights of these three Petitioners, but it puts into the Books, in one of our leading States, a reactionary doctrine of law in the important field of Education, at a time when the opposite course is dictated by every social and patriotic consideration.

Here again we cited and argued many cases on this point of *contract power* in our Brief before the State Court. We will appreciate arguing them again if Certiorari is granted by this Court.

C. False Doctrine as to "One-Year" Contracts.

In our main Brief, we cited and discussed many Normal School cases from Wisconsin, Pennsylvania, California, Indiana, Massachusetts and New York, where the courts

in Mandamus proceedings had reinstated teachers, and had relied on statutes no broader or more effective than the laws of Illinois. We will not stop here to cite these cases. The reviewing Court below swept them all aside with this statement:

> "Decisions have been cited from other States construing teachers' tenure laws, but each of those decisions is based on a positive statute in each State permitting such tenure, and they are therefore inapplicable to the present situation and unnecessary to discuss or analyze." (R. 147)

It is not logical to think that the Illinois law concerning Normal School tenure is so different from that of all the other States that not a single decision from another State even deserves consideration in such an important case as this. The opinions in all of those cases cite and discuss decisions from other states. We believe those cases deserve some attention and particularly we believe that the Wisconsin case (*Wisconsin ex rel. Karnes* v. *Board of Regents of Normal Schools,* 269 N. W. 284, 1936) is almost a "black hog" case, and is so convincing as to be almost controlling. Yet all of these cases from other States are simply ignored by the Opinion below.

In our Brief below we cited and discussed four Illinois cases, decided in recent years, each of which takes a liberal attitude in protecting a public school teacher against *arbitrary action* of a school board. (*Hartman* v. *Board of Education,* 356 Ill. 577, 191 N. E. 279, decided in 1934; *Sloan* v. *School Directors,* 373 Ill. 511, 26 N. E. (2) 846, decided in 1940; *Armstrong* v. *City of Chicago,* 247 Ill. App. 584, decided in 1928; and *Bowden* v. *Board of Education,* 264 Ill. App. 1, decided in 1931.) We will stop here only to discuss the Sloan case, *supra.* In that case the teacher had been employed under a contract *for three years.* She taught one year, when she was discharged without any hear-

ing and without cause. The Supreme Court of Illinois in that case took a position squarely in conflict with its position in this case. One of the specific contentions of the defendant Board was that it "had no authority to employ appellant for a term of more than one year." In denying that contention and awarding relief to the teacher, the Illinois Court there said:

> "In support of their contention that a Board of School Directors cannot employ a teacher for more than one year, appellees cite *Stevenson* v. *School Directors,* 87 Ill. 255, and *Davis* v. *School Directors,* 92 Ill. 293. Those cases do so hold, but *they have no application here* for they were decided before the enactment of Sec. 127a *supra,* Laws of Illinois, 1927, p. 823."

It will be noted that the Stevenson case *supra* and the Davis case *supra,* which the Illinois Supreme Court said in 1940 were *no longer the law in Illinois,* are the very cases cited and relied on in the Opinion below for the "one year contract" doctrine laid down in this case.

We have used the words "False Doctrine" advisedly at the head of this part of our Brief. We believe we have proved our right to use such strong language.

D. Rules and Customs of Board Violated.

In this Petition (*ante,* pages 7 to 9) we have set out four formal Rules of the Defendant Board which in effect granted "continuing tenure" to these Petitioners, each of which Rules has been violated and rendered nugatory by the judgment and Opinion below. We have seen that under two express provisions of the Illinois Statutes[10] the

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[10] Civil Administrative Code, Ill. Rev. Stat., Chap. 127, Sec. 58; and DeKalb School enabling Act, Ill. Rev. Stat., Chap. 122, Sec. 451.

Defendant Board is specifically granted power to adopt "rules and regulations for the government of its *members, official agents* and *employees.*" For many years these Rules have been recognized and enforced in all these Schools. The Attorney General of the State as we have seen (*ante,* p. 8 this Petition) has specifically approved the validity of one of the most significant of these Rules covering security of tenure for teachers in these Schools.

And yet in spite of all this the judgment below with one blow has destroyed all the Petitioners' vested rights acquired under such Rules and such interpretation. We will not labor this point further. We have already said, and we now repeat, that the refusal of the reviewing Court to recognize and enforce these Rules and Petitioners' contracts under them, constitutes a violation of "Contract Clause" of the Federal Constitution.

E. Prior Construction of Laws Upset.

We have already pointed out that the Opinion below is in implicit conflict with the Opinion of the State Court in the *Sloan* case, *ante,* on the question of the term of teachers' contracts. We have also pointed out in our Petition for Rehearing, in vigorous language (R. 177-179) that the Opinion below is in conflict with the recent Opinion of the State Court in the University of Illinois case.

We believe we have here a clear example of the thing this Court condemned in the *Brand* case (*supra*)—that is a *later* decision of the State Court upsetting an accepted *prior construction* of State law under which vested rights have accrued.

We urge that it was just for such cases as this that the jurisdiction of this Court over "state laws" was put into the Federal Constitution. The Opinion below, we submit, is clearly *out* of *line* with the prior interpretation of the laws of Illinois. The judgment below "runs counter to the * * * earlier decisions" (as this Court said in the *Brand* case) with regard to continuing contracts for these teachers, and is therefore wrong.

Conclusion.

When Miss Davidson was on the stand, Counsel for Respondents brought out the following testimony about her interview with the School President just a few days before she was dismissed (R. 67):

> "He said that if I would sign a paper stating that I would 'cooperate' that I might continue for the present year in carrying on my duties and that he would be the sole determinor as to whether or not I was cooperating. I asked him for a clear understanding of 'cooperation' and he said if I felt that way about it I might resign right now.
>
> "He said if I did anything about this action my contract would be terminated at once."

It is hardly to be wondered at that the trial court was shocked by such methods and that the following colloquy took place (R. 67):

> "The Court: Was that in Illinois?
> The Witness: Yes.
> The Court: It sounds like some other place."

Here we have the pitch-note of this entire controversy. Arbitrary and dictatorial action resulting in the total destruction of the Petitioners' rights to their long-term contracts at the College where they had taught for many years—and for a mere personal whim of the School Presi-

dent. From such a beginning there has resulted a gross violation of the laws of the State of Illinois so far as the highly cherished and vested rights of these Petitioners are concerned. The trial court justly granted the Petitioners the only relief which would in any way recompense them. The reviewing Court struck down that relief, and denied every right of the Petitioners. For some reason the reviewing Court felt called upon to render a Draconian judgment against these teachers.

It has thus turned out, in this case, as sometimes happens, that this Honorable Court is the last resort of the injured litigant against semi-official despotism and injustice. For these Petitioners have been most grievously wronged and injured—even if the reviewing Court, for some obscure reason, felt called upon to sustain the arm of bureaucracy against them.

We repeat here what we urged in our Petition for Rehearing below (R. 154):

> "We need hardly suggest that the decision and Opinion in this case comes as a shock to the three teachers who are Petitioners here. They believed in the merit of their case when they started it, and they still hold to that belief. They feel they have been caught in some whirlpool of changing social views, perhaps somehow related to current public events, or rather they have been caught in a strong ebb-tide of such changing opinion. For them the decision (of the reviewing Court) rests in the field of policy making, rather than in the field of jurisprudence."

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

URBAN A. LAVERY,
Attorney for Petitioners.

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No. 953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

PEOPLE OF THE STATE OF ILLINOIS, EX REL. BLANCHE DAVIDSON, CARL C. CRAMER AND FRANK W. PHILLIPS, PETITIONERS,

vs.

PRESTON BRADLEY, JOHN DILL, OTTO G. BEICH, ET AL., RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ARGUMENT.

I.

THE CONSTITUTIONAL QUESTION WHICH THE PETITIONERS NOW SEEK TO PRESENT TO THIS COURT WAS NOT PROPERLY RAISED OR ASSERTED EITHER IN THE TRIAL COURT OR IN THE SUPREME COURT OF ILLINOIS BECAUSE:

FIRST: THE RESPONDENTS VERY CLEARLY PLEADED THE STATUTORY CONSTRUCTION WHICH THE PETITIONERS NOW ASSAIL AS RENDERING THE STATUTE UNCONSTITUTIONAL, BUT THE PETITIONERS DID NOT EVEN INTIMATE ANY CLAIM THAT SUCH A CONSTRUCTION WOULD RENDER THE ACT UNCONSTITUTIONAL UNTIL AFTER THE SUPREME COURT'S DECISION.

SECOND: EVEN IF, AS THE PETITIONERS CONTEND, THE CONSTITUTIONAL QUESTION HAD BEEN "INTERJECTED INTO THE CASE FOR THE FIRST TIME BY THE OPINION OF THE SUPREME COURT," PETITIONERS WOULD HAVE HAD AN OPPORTUNITY TO RAISE THE CONSTITUTIONAL QUESTIONS BY A PROPER PETITION FOR REHEARING, PREPARED IN COMPLIANCE WITH THE APPLICABLE RULES OF COURT. THEY FORFEITED THIS OPPORTUNITY BY FILING A PETITION WHICH DID NOT COMPLY WITH SUCH RULES AND WHICH WAS THEREFORE STRICKEN.

Under the second Point in this brief, the respondents argue that the supposed federal constitutional questions are not substantial and that, even if they had been properly raised in the state courts, the present petition for *certiorari*

should be denied. However, since a proper assertion of federal questions in state tribunals is prerequisite to access to this court upon those questions, the respondents first submit that no federal question was properly raised in the state courts.

(i)

The respondents very clearly pleaded the statutory construction which the petitioners now assail as rendering the statute unconstitutional, but the petitioners did not even intimate any claim that such a construction would render the act unconstitutional until after the Supreme Court's decision.

It should first be observed that the petitioners make no claim, either by argument or even by assignment of error, that Illinois' procedural law—whether the repository of such procedural law be Illinois' statutes, the rules promulgated by her Supreme Court or her case law—does not afford an adequate opportunity to litigants to elicit decisions upon questions of federal constitutional law. It must therefore be assumed that failure to comply with the adjective law of Illinois is *ipso facto* a failure properly to save federal questions for review by this court.

The Illinois court, whose rules and decisions with respect to what constitutes a proper assertion of a constitutional question are conceded by these respondents to be stricter than the rules prevailing in many other jurisdictions, but which rules are nevertheless not challenged by the present petitioners as denying them due process of law, plainly mark the course of procedure which must be followed in order to evoke a decision by either the trial court or the Supreme Court upon the question whether a statute, if construed adversely to a litigant's contentions, is unconstitutional.

The decisions of the Illinois court require that where one party asserts a construction of an Illinois statute and

where his adversary intends to assert that such construction would render the statute unconstitutional, such claim of unconstitutionality conditional upon such a construction's prevailing must be made **in the pleadings in the trial court**; and that the question will not be deemed to arise after a decision adopting the construction so charged to invalidate the act in question.

The application of this rule is clearly instanced by a contrast of two decisions of the Supreme Court of Illinois pronounced at the same term (the April term, 1934) in one of which cases the constitutional question was held to have been properly raised and in the other of which cases the question was held not to have been properly raised. These two cases are *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers,* 371 Ill. 377, and *Economy Dairy Co.* v. *Kerner, Attorney General,* 371 Ill. 261.

In the first of these cases, the plaintiff dairy charged **by its pleadings** that certain provisions of an Illinois statute relating to picketing, if properly construed, did not authorize picketing by a union which was a stranger both to the plaintiff and its employees but further contended that if the statute should be construed as permitting such picketing, it was unconstitutional. The Supreme Court decided the constitutional question.

In the second of the cases cited above, the plaintiff sought to enjoin the enforcement of a statute which, as construed by the Attorney General, forbade the sale of the plaintiff's milk as in violation of the health measure enacted by the statute. The plaintiff merely charged in its complaint that the statute when properly construed did not apply to its dairies. However, on **oral argument in the trial court,** the plaintiff urged that the Attorney General's construction, if that construction prevailed, rendered the act invalid because such a construction would permit the sale of unpasteurized milk if such milk were imported from other states but did not permit the sale of milk produced

in Illinois unless such milk were pasteurized, thereby denying the plaintiff dairy equal protection of the law.

This argument was made only in support of the plaintiff's contention that its construction of the act was the proper one; and the complaint did not charge, as alternative to the plaintiff's contention that the act should be construed as inapplicable to its dairy, that, if construed as applicable to the dairy, it was unconstitutional.

In the Supreme Court of Illinois, the plaintiff argued that the trial court's construction of the statute, if correct, rendered the act void. This question, however, was not raised by the pleadings.

The Supreme Court of Illinois held that no question of the constitutionality of the act was properly raised in the trial court and it transferred the cause to the Appellate Court, it being the practice in Illinois to transfer cases in which appellate jurisdiction is based upon the constitutional question which was not properly raised below.

In the instant case the respondents very clearly pleaded that under the applicable statutes, the Normal School Board had no authority to employ any teacher for longer than one year. (R. 44.) Petitioners have not incorporated respondent's briefs in the Supreme Court in the record but it appears from the Supreme Court's opinion that this question was argued by respondents (there appellants).

Thus petitioners were apprised, both in the trial court and in the Supreme Court, that the respondents contended that under a proper construction of the applicable Illinois statutes, the faculty of the Normal School was, in contemplation of the Illinois law, utterly impotent to make a contract or engagement employing a teacher for a period of more than one school year. Respondents under this point do not argue the substantive merit of this contention. Here allusion is made to the following cases only to show that the question of statutory construction was very plainly

raised by the respondents in the courts of Illinois because it was upon these cases that respondents relied and it was these cases which were cited by the Supreme Court of Illinois in its opinion:

Stevenson v. *School Directors*, 87 Ill. 255.
Davis v. *School Directors*, 92 Ill. 293.
People v. *City of Chicago*, 278 Ill. 318.

Confronted with the contention that the statutes in question, when properly construed, conferred no authority upon anyone to bind the State by a "permanent tenure contract," petitioners were required to assert that such a construction of the statute would deprive them of constitutional rights. (*Economy Dairy Co.* v. *Kerner, Attorney General*, 371 Ill. 261, cited and considered above.)

Petitioners, although aware of respondents' contention at all times, did not seek to encounter that contention upon any constitutional grounds until after the Supreme Court had decided the case, when, for the first time, petitioners urged their present contention in a paper which they denominated a petition for rehearing but which the Supreme Court refused to recognize as complying with its rules governing such petitions.

Even if the petition for rehearing had not otherwise offended the rules, it is clear that, under the cases above cited, Illinois practice did not permit the petitioners to litigate only a question of statutory construction in the trial court and in the Supreme Court and after the Supreme Court had decided this question of statutory construction raise for the first time a question of constitutional right on petition for rehearing.

Therefore the respondents submit that the petitioners did not properly raise the constitutional questions in the state court.

* * * * *

(ii)

Even if, as the petitioners contend, the constitutional question was "interjected into the case for the first time by the opinion of the Supreme Court," petitioners had an opportunity to raise the constitutional questions by a proper petition for rehearing, prepared in compliance with the applicable rules of court. They forfeited this opportunity by the filing of a petition which did not comply with the rules.

Even if we accept the petitioners' contention that they had a right to raise the constitutional questions for the first time on petition for rehearing, it is clear that it was incumbent upon them to comply with the rules of the Supreme Court of Illinois (unless those rules were themselves unconstitutional). Having failed either to comply with those rules or to challenge the constitutionality of the rules themselves, they have no right to impose upon this court the consideration of a question which the Supreme Court, under rules promulgated by that court and binding upon the petitioners, was not bound to consider.

As petitioners point out in this court, the Supreme Court of Illinois did not state the respects in which the petition failed to comply with the rules. However, a mere examination of the petition (R. 151-187) and of the applicable rule clearly demonstrates that the petition was in flagrant violation of the rule.

Rule 44 of the Supreme Court (370 Ill. 49) contains the following provision:

> "The petition shall state **briefly** the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon, and with authorities and suggestions, concisely stated, in support of the points. **Arguments in support of the petition will not be permitted. Any petition violating this rule will be stricken.**"

Even a cursory glance through the pages of the petition for rehearing shows that it was written in utter disregard of the language emphasized above. The petition is thirty-seven pages in length, longer than petitioners' entire petition, statement and brief in this court. (R. 151-187.)

Pages 1 to 3 are devoted to a declamation upon the evil consequences which must result from the decision. The tenor of the petitioner's rhetoric throughout the entire petition is inflammatory. Upon pages 36 and 37, one reads that petitioners

> "venture to predict that this opinion must have already produced some consternation among the faculties of all the Teachers Colleges,"

that

> "the decision and opinion in this case comes as a surprise not only to these three teachers but also to the defendant's Teacher College Board itself,"

and further descantations upon the philosophy of education with respect to permanent tenor. The petition closes with a quotation from the homilitics of Bacon to the effect that

> "patience and gravity of bearing is an essential part of justice"

and recites Bacon's further admonition that it is the duty of the courts

> "to interpret the law and not to make it."

The petition clearly violated that part of the rule which provided that such petition should not be argumentative. The Supreme Court of Illinois could not have entertained the petition without setting at naught its own rule—a rule which had for its object not only decorum in presentation but brevity essential for the dispatch of the court's business.

Therefore the petitioner's petition for rehearing was tantamount to no petition at all; and the petitioners are not at liberty to speculate—or to ask this court to specu-

late—as to what the decision of the Supreme Court of Illinois would have been had that court felt that it could consider their petition without making a travesty of its own rules.

For the foregoing reasons the respondents submit the question of the constituionality was never properly raised in the Courts of Illinois and that even, if such question was substantial, the present petition for *certiorari* should be denied.

II.

THE FEDERAL CONSTITUTIONAL QUESTIONS ASSERTED IN THIS PETITION, EVEN IF THEY HAD PROPERLY BEEN RAISED IN THE COURTS OF ILLINOIS, ARE NOT SUBSTANTIAL.

The petitioner's brief in this court intimates that there have existed either statutory or judicial rights of permanent tenure with respect to teachers' employment generally or with respect to such employment at Illinois' Normal Schools in particular. The petitioners do not cite any statute or decision creating, confirming or recognizing any such right because no such statute or decision exists.

At pages 25 and 26 of petitioner's brief they cite Section 12 of the Normal School act. That statute, at least at the time that it was enacted, did indeed provide that trustees might remove instructors

> "after having given ten days' notice of any charge which may be duly presented and reasonable opportunity for defense."

But it was never contended or even intimated prior to the present case that this statute had any application except to the removal of instructors **during the period for which they were employed**; and this section had never been interpreted as rendering contracts of employment indefinite or permanent as to period.

It has been an inveterate principle of the law of Illinois, recognized consistently by the Supreme Court of Illinois since the early days of that court's history, that in the absence of express statutory authority, contracts employing teachers for periods longer than the school year have are absolutely void as to the period in excess of the school year.

Respondents recognize that the wisdom of the policy embodied in this rule is one which may be highly debatable in the mind of an educational economist and that statutes of other states have enacted a contrary policy. On the one hand, advocates of permanent tenure argue the enhanced stability and individual security of a school system which assures its teachers permanent tenure. On the other hand, foes of the plan point to the evils of academic mortmain where teachers can be selected by a board whose action must bind its successors for forty years.

But however debatable the question of policy may be, the Supreme Court of Illinois has steadfastly adhered to the rule that no temporarily incumbent school administration may bind its successors by contracts visiting such successors with liability upon permanent or indefinitely long term contracts of employment.

An early case recognizing this rule is that of *Stevenson v. School Directors,* 87 Ill. 255. In that case, a public school board had power to

> "appoint all teachers, fix the amount of their salaries, etc."

The statute was silent as to whether such contracts of employment might or might not contemplate a period of tenure longer than the current school year. It was held that, if local school boards were at liberty to contract for periods longer than one year, the persons incumbent as members of the board at any time might fetter their suc-

cessors in the selection of teachers. The court said, pages 257 and 258:

> "If the contract here sought to be enforced were to be held valid, it would necessarily be because the board of directors are unlimited in respect of contracting for future services of teachers. If they may contract for services to be commenced four months in advance, and after the board as organized shall cease to exist, why may they not do so indefinitely? If they are not, in this respect, limited by the current school year, where is the limit?"

In the case of *Davis* v. *School Directors,* 92 Ill. 293, it was likewise held that a contract to employ a teacher for a period extending beyond the school year was void, the reason being that to sustain such contracts would be to allow one administration of a school to visit upon succeeding administration *personnel* whom the successors have not selected.

This rule was affirmed in *People* v. *City of Chicago,* 278 Ill. 318. This case involved a claim that the code governing Chicago's schools empowered the school board to enter into permanent tenure contracts. Notwithstanding the broad and comprehensive administrative powers conferred on the Chicago school board by the code, the court held that the absence of an express provision authorizing the board to contract for teachers, employment beyond the school year was fatal to such a contract.

It should be particularly noted that the rule that a board may not employ a teacher for more than one year is not based upon any express provision in any statute. On the contrary, the rule is based upon the **absence** of any provision expressly authorizing one administration so to entail the tenure of teachers as to prevent succeeding administrations from replacing them with other teachers.

The excerpt hereafter quoted makes it very plain that the board may refuse to renew a contract, even though its

reasons for doing so are arbitrary or even capricious. It should also be observed that the court expressly held that no expectancy or right under any pension plan abrogated or modified this rule. The court said at pages 325 and 326:

> "By the statute the board of education in cities having a population of 100,000 or more is given complete control of the schools of the city. Among its powers is that of employing teachers and fixing the amount of their compensation. It is empowered to enact such ordinances as may be deemed necessary and expedient for the proper management of the schools. The board consists of twenty-one members, appointed by the mayor of the city. The tenure of office is three years, the terms of office of seven of the members expiring each year. A new board is thus brought into existence each year. **The board has no power to make contracts for the employment of teachers to extend beyond the ensuing school year.** (*Stevenson* v. *School Directors*, 87 Ill. 255; *Davis* v. *School Directors*, 92 id. 293.) **A new contract must be made each year with such teachers as it desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all.** The board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments. It is no infringement upon the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action. It is free to contract with whomsoever it chooses. Neither the constitution nor the statute places any restriction upon this right of the board to contract, and no one has any grievance which

the courts will recognize simply because the board of education refuses to contract with him or her. Questions of policy are solely for determination of the board, and when they have once been determined by it the courts will not inquire into their propriety.

The existence of a teachers' pension funds in the city of Chicago does not restrict the board of education in its right to select such persons as teachers as it may desire to employ, nor does it confer upon one who has been a contributor to such fund any right to demand that he or she be re-employed. The only right upon which a contributor to the fund can insist in case the board concludes that it will not re-employ him or her, is the right to receive at once the money he or she may have contributed to the funds. (Smith-Hurd's Stats. 1916, chap. 122, sec. 161.)"

We repeat that in the case above cited, there was **no statute** that limited the period for which a teacher might be employed. On the contrary, the decision was based upon the same general considerations which had dictated a like decision in the earlier cases.

The respondents therefore submit that the contracts of employment necessarily terminated at the end of the school year; and that the petitioners were never in fact dismissed or discharged, but on the contrary, their employment ceased because new contracts were never made.

In any event, the question was one of state law; and the ruling of Illinois' court of last resort is conclusive here.

* * * * *

The respondents contended in the state courts that the provisions of Section 12 of the Normal School act (Ill. Rev. Stats. 1939, Ch. 122, Par. 462), relied upon by the petitioners, had been repealed by a general statutory revision of the administration of the normal school system before any of petitioners were employed. (Ill. Rev. Stats. 1939, Ch. 127, Par. 59.) The Supreme Court of Illinois did not decide this question because that court held that in any event, the provisions of Section 12 with respect to the right of

teachers to a hearing before dismissal applied only to teachers dismissed during the term for which such teachers were employed; further held that such period could not exceed the school year; and therefore held that the statutory provision for a hearing before dismissal, even if that provision were not repealed, **did not entitle teachers to a statutory hearing after the petitioners' employment had ceased and before such teachers were reemployed by a new contract for the next year.**

As the cases above cited illustrate, this decision imported no new principle into the law of Illinois. In the case of *People* v. *City of Chicago,* 278 Ill. 318, already cited and considered, the court had applied the rule that contracts employing teachers may not exceed the school year to the school system of the City of Chicago, notwithstanding the comprehensive language of the act governing Chicago School system, which language is considered in that case.

Very clearly this question was purely and entirely one of the construction of a state statute. Of course, the decision of the Supreme Court of Illinois upon that question is conclusive here.

Petitioners rely heavily upon the case of *Sloan* v. *School Directors,* 373 Ill. 511, contending that this case established a doctrine which the present case unconstitutionally repudiates. The truth is that that case strongly supports the respondents. In that case **the statute expressly authorized permanent tenure contracts.** The court, although upholding the contracts in that case solely because the applicable statute authorized such contracts, nevertheless again declared that **in the absence of such a statute, the contract would be void.** The court said:

> "In support of their contention that a Board of School Directors cannot employ a teacher for more than one year, appellees cite *Stevenson* v. *School Directors,* 92 Ill. 293. Those cases do so hold, but **they have no application here** for they were decided

before the enactment of Sec. 127a *supra*, Laws of Illinois, 1927, p. 823."

The statute cited in the excerpt above quoted does not apply to normal schools and petitioners do not contend that it does.

Thus it appears that in the present case the only question decided by the Supreme Court was that of whether, under Illinois law, the normal school had power to conclude a contract of permanent or indefinite employment with the petitioners. The Supreme Court, following an unbroken line of decisions, held that it had no such power. Therefore, the Supreme Court held, **not** that the petitioners were lawfully discharged, but that their contracts of employment expired and that they had no right to compel the respondents to make an entirely new contract with them.

The pension act relied upon by the petitioners in support of their claim of vested rights did not go into effect until after their employment had terminated. (See *Petitioners' Brief*, pages 21 and 22, where this is admitted.)

Petitioners' claim of right to a hearing is based entirely upon statutes which, as petitioners themselves admit, did not by their terms apply to the normal schools at the time of the termination of petitioners' employment. In the absence of statute, there is no federal constitutional right to a hearing before dismissal where the discharged person is a state employee. *Wilson* v. *North Carolina*, 169 U. S. 586.

A fortiori there is no federal constitutional right to a hearing by a teacher whose contract of employment has expired.

THE BRAND CASE DISTINGUISHED.

Petitioners rely upon this court's decision in the case of *Indiana* v. *Brand*, 303 U. S. 95. That case is so clearly distinguishable as not to be pertinent to the case at bar. In the *Brand* case the Indiana statute expressly provided:

> "That any person who has served or who shall serve under contract as a teacher in any school corporation * * * for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation."

Thus the Indiana legislature had positively enacted a statute that any teacher who had served for five or more successive years and who shall thereafter enter into a contract to teach a further period should become a permanent teacher.

The contract of employment expressly incorporated the provisions of its statute into its text. Obviously this court had no choice in declaring that a construction by the state court which nullified both the statutory provision and the contractual adoption of the statutory provision offended the First Amendment.

The difference between the Indiana case and the present Illinois case is simply this: In Indiana, a statute provided that the appellant should be a "permanent teacher." A contract expressly recognized the teachers' permanent *status*. In the present case, the Illinois Supreme Court has consistently held that contracts employing teachers expire at the end of the school year and that an express provision employing a teacher for longer than that period is absolutely void.

In conclusion: The petitioners complain that the present decision is a shocking repudiation of the law of Illinois. At the same time, they complain that the present decision is reactionary and that it is founded upon decisions that are, in petitioners' own phrase, "hoary with age." Of course a reactionary view, adhering to antiquated precedents, no matter to what other criticism it may be susceptible, is not subject to criticism on the ground that it embodies an unconstitutional revolution on the part of the court and

thereby repudiates antecedently vested rights. It is solely upon the ground of this latter criticism that the petitioners seek access to this court in the instant proceedings.

CONCLUSION.

For the foregoing reasons, the respondents respectfully submit that the present petition for a writ of *certiorari* should be denied.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois
Attorney for Respondents.

William C. Wines,
Assistant Attorney General,
Of Counsel.

No. 953

MAY 22 1943

Supreme Court of the United States

OCTOBER TERM, 1942

PEOPLE OF THE STATE OF ILLINOIS, ex rel. BLANCHE DAVIDSON, CARL C. CRAMER and FRANK W. PHILLIPS,

Petitioners,

vs.

PRESTON BRADLEY, JOHN DILL, OTTO G. BEICH, HARRIETT McINTYRE, CHARLES E. MORRIS, HELEN ROSE PEGELOW, RUSSELL GUIN, LINDELL STURGIS, JACOB E. ALSCHULER, FRANK G. THOMPSON, and JOHN A. WIELAND, Constituting THE TEACHERS COLLEGE BOARD OF THE STATE OF ILLINOIS,

Defendants.

REPLY BRIEF FOR PETITIONERS.

URBAN A. LAVERY,
Attorney for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

PRELIMINARY COMMENT.

In Cardinal Newman's "GRAMMAR OF ASSENT"—a classic treatise on the philosophy of the reasoning processes of the human mind—there appears on the flyleaf a Latin axiom taken from St. Ambrose, which Newman obviously intends as the main thesis of his book. It is indeed a maxim which would not be out of place if it were engraved on the walls of our Courts of Justice, where it could be read and pondered by counsel arguing their cases; for it says:

"Non in dialectica complacuit Deo salvum facere populum suum."

That axiom has a direct cogency for our present discussion; because here, in a single sentence (we submit) there is found a complete reply to the Brief of opposing Counsel filed in this Court. Here, in short, we have high authority for the proposition that dialectics alone are never an adequate answer to a just cause. And nimble dialectics make up the chief portion of Counsels' opposing Brief.

We think this Court will be struck by the fact that the opposing Brief here (like the Opinion of the reviewing Court below), treats this case as if it were an abstract controversy of law, which is somehow to be argued, and considered, and decided *entirely aside from the facts of the case.* Counsel completely ignore (as the reviewing Court ignored, for all practical purposes) the rather shocking series of circumstances and events appearing in the Record, which resulted in the dismissal of the Petitioners as teachers in the DeKalb School. It is a challenging criticism on Counsels' Brief, and yet a true one, to say that it might well have been written in some other case. Such *argument in a vacuum,* when presented in a court of justice, pleases neither God nor man. Certainly, it does little to advance the ends of justice.

But let us pass this point and get to the meat of our Reply Brief.

I.

THE FEDERAL QUESTIONS RAISED.

The first major point made by Counsel is that the Federal Questions here asserted were "not properly raised" below, and therefore have been "forfeited" so far as this Court is concerned. This contention is made on two grounds to which we will advert in their order.

Under this point Counsels' first headnote reads:

> "*First:* **The Respondents very clearly pleaded the statutory construction which the Petitioners now assail as rendering the statute unconstitutional, but the Petitioners did not even intimate any claim that such a construction would render the Act unconstitutional until after the Supreme Court's decision.**"

Four pages of rather labored and involved argument are given in support of that contention. We say in all earnestness that we find it difficult to follow the thread of Counsels' thought on this point. So far as we understand that contention it seems to assert that Petitioners in this Court "assail as unconstitutional" some Statute of Illinois.

Our reply is that we have *never* contended that the basic Statutes involved in this case are "unconstitutional," or even questionable. On the contrary, we have always asserted their validity. It is the *emasculation and destruction* of those statutes by the Reviewing Court below, to which we so strenuously object.

With this comment we will leave this contention of Counsel to the determination of the Court.

Counsels' next headnote under this part of their Brief says:

> "*Second:* **Even if, as the Petitioners contend, the Constitutional question had been 'interjected into the case for the first time by the Opinion of the Supreme Court,' Petitioners would have had an opportunity to raise the Constitutional questions by a proper Petition for Rehearing, prepared in compliance with the applicable Rules of Court. They forfeited this opportunity by filing a petition which did not comply with such rules and which was therefore stricken.**"

Here Counsel admit the right of the Petitioners *in this case* to raise and argue the Federal Questions for the first time by Petition for Rehearing. But Counsel are attempting to *read out of the Record* the entire Petition for Rehearing. Counsel do not dispute the *fact* that the Petition for Rehearing squarely and bluntly raised the two Federal Questions here urged (R. 180-182). They merely argue that our Petition was so "inflammatory" and so "argumentative" that it "forfeited" its right to consideration. We do not believe this Court will accept that contention of Counsel. We particularly call the Court's attention, by way of marginal note, to certain specific facts as shown by the Record.[1]

It appears from the recital of the Reviewing Court's proceedings in the foregoing Note, that the Court itself was rather adept at the business of dialectics. That Court

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[1] A. The Petition for Rehearing was filed with the Reviewing Court on February 15, 1943 (R. 149) and within the time allowed.

B. The Reviewing Court's judgment and Opinion, *for the first time*, interjected into the case the Federal Questions here raised. It was therefore necessary for us to *argue* those questions in our Petition for Rehearing. We could not do otherwise; and we so stated in that Petition. (R. 180-181)

C. Under the practice in Illinois (as probably elsewhere) the Clerk of the Reviewing Court *at once* forwards all Petitions for Rehearing to the homes of the Justices, when the Court is not in session. The members of the Court, therefore, had this Petition for Rehearing before them for about three weeks before the March Term began on March 8th. (R. 188)

D. The Court was thereafter in session at Springfield one full week after the March Term began before it disposed of this Petition for Rehearing. (R. 188) That delay was itself unusual.

E. On March 15, 1943, during the session of the full Court, the following unusual order was entered:

"ORDER

"Now on this day the Court having duly considered the petition for rehearing in the above entitled case, and the Court being fully advised in the premises,

"It is hereby ordered that the said petition for rehearing be and the same is stricken in violation of rules."

F. Thereafter, and also on March 15, 1943, and during the session of the full Court, the following recital appears in the proceedings of the Reviewing Court:

"And afterwards, to wit: upon the striking of the petition for rehearing in violation of rules on March 15, A. D. 1943, the opinion was modified by deleting the fourth paragraph from the end of the opinion, the deleted paragraph being in the words and figures following, to wit:" etc.

shows that it *first* "duly considered" the Petition for Rehearing; the Court then recites that it was "fully advised in the premises"; it then proceeds to *modify its Opinion* in two important respects, as insisted upon in the Petition for Rehearing. Notwithstanding these recitals, the Reviewing Court thereafter ordered the Petition "stricken," without a single word of explanation.

We say, therefore, that there is no sound basis whatever for Counsels' contention that the Federal Questions were not properly raised before the Reviewing Court below. We leave this jurisdictional point without further discussion.[a]

II.

THE MERITS OF THE CASE.

Point II of Counsels' Brief is devoted to what may fairly be called the merits of the case before this Court. Counsels' headnote here reads as follows (Brief, p. 9):

> **"The federal constitutional questions asserted in this petition, even if they had properly been raised in the Courts of Illinois, are not substantial."[b]**

Counsels' entire argument here is a reassertion of a false doctrine which we challenged in the Brief attached

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[a] AS TO "INFLAMMATORY" STATEMENTS, ETC.

Counsel interlard this part of their Brief with charges and innuendoes about the professional character and quality of our Petition for Rehearing. (Brief, pp. 8 and 9) They say that that Petition is "inflammatory"; that it is a "*declamation* upon the evil consequences" of the Opinion below; that it contains "descantations upon the philosophy of education with respect to permanent tenor" (sic). We waive all these charges aside; because we think the Petition for Rehearing will speak for itself. The conclusion of that Petition is particularly condemned because we there cited Bacon's "Essay of Judicature." We pass this charge by, also, with the incidental comment that the great philosopher, who served successively for fourteen years as Solicitor General, Attorney General, and Lord Chancellor of England, hardly needs any defense from us, as a citable authority, particularly when his comment is cited in a case where the Law of Education is the main issue.

[b] It is worth noting that (aside from a long quotation from a reported Illinois case) Counsels' entire argument on the merits takes up only about 5½ pages in their 17-page Brief.

to our Petition filed in this Court (pp. 27-30). Nevertheless Counsel repeat that false view of the law of Illinois by saying:

> "It has been an inveterate principle of the law of Illinois, recognized consistently by the Supreme Court of Illinois since the early days of that Court's history, that in the absence of express statutory authority, contracts employing teachers for longer periods than the school year *have* (sic) are absolutely void as to the period in excess of the School year."

The first point to be noted about that contention of Counsel is that it utterly ignores the fact that the DeKalb School, like all the Teachers Colleges in Illinois, is governed by a special statutory Charter (R. pp. 163 and 170), and is *not* governed by the ordinary "School Law" of the State. Here is a persistent fallacy which constantly appeared in Counsels' Briefs below, and which appears in the Opinion of the Reviewing Court. We repeat that we have clearly shown, in our main Brief in this Court, the falsity of that contention and that strategy.

We will not labor this point further, nor burden the Court with further rebuttal argument on the merits of the case.

III.

A QUESTIONABLE INCIDENT.

Since our Petition in this Court was filed, there has come to our attention an incident which we hereby report to this Court. We have located by chance an original official Opinion of the present Attorney General of Illinois, dated April 27, 1942, which we believe is pertinent here. This Opinion was given just one month before the suit below was filed and before opposing Counsel knew

that this controversy would arise. That Opinion deals also with the law of Teachers Contracts in Illinois. Both implicitly and textually, that Opinion is in direct conflict with the theory and the contentions of the Attorney General of Illinois made in his Brief filed in this Court.[4]

In that Opinion the Attorney General was asked to advise a local School Board on a question which the Opinion itself states as follows:

> "Whether or not the School Board may properly provide in a contract hiring teachers for next year that by mutual consent of the teachers and the School Board, the services of such teachers are to be for a term of one year only, and at the end of the year the contract hiring the teacher shall terminate. . . ?"

The Attorney General answers that question with a definite "No"; and that is the correct answer. But the reasons given are so entirely at variance (as we have said) with Counsel's argument in this Court that we have set out below the comparable subject-matter in parallel columns, where the eye can scan them at a glance.

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[4] Since this Opinion is not yet published we set it out as an appendix to this Brief.

It is worth noting that this Opinion quotes a strong and vigorous and sound statement from 379 Ill. 155 on the rules of statutory construction. We say here with strong emphasis that the rules there laid down are defied and rejected by the Opinion of the Reviewing Court below, and by Counsels' Brief in this Court. If the provisions of the DeKalb School enabling Act as to "hearing" before dismissal of teachers (See our main Petition p. 6) is construed according to the rules in that statement of law, then the Opinion below and the Brief of Counsel in this Court are both untenable on this point.

Language of Attorney General's Opinion.

"From a reading and study of the Teachers' Tenure Act, [Act of 1941; Ill. Rev. Stat. chap. 122, Sec. 136c] it is clear that the intention of the Legislature was to provide qualified, industrious and conscientious school teachers, who have served the probationary statutory period of two years, with security of position, in which they have already demonstrated their ability to fill in an efficient and satisfactory manner. Having attained this security of position, it would be an absurd construction to hold that a school board could take from the teachers this right by requiring another contract which would be good for only one year.

The Act does provide a method for removing an unfit teacher, however. It does eliminate the possibility of a good teacher losing his or her position for personal, trivial, inconsequential, whimsical or political reasons.

I am, therefore, of the opinion that after a teacher completes the two year probationary period and comes under the provisions of said Act no further contract is required of the teacher, and that a contract for one year, as suggested, would be invalid for the reasons herein stated."

Language of Attorney General's Brief.

"It has been an inveterate principle of the law of Illinois, recognized consistently by the Supreme Court of Illinois since the early days of that court's history, that in the absence of express statutory authority, contracts employing teachers for periods longer than the school year have are absolutely void as to the period in excess of the school year." (Brief, p. 10.) . . .

"**It should be particularly noted that the rule that a board may not employ a teacher for more than one year is not based upon any express provision in any statute.** On the contrary, the rule is based upon the **absence** of any provision expressly authorizing one administration so to entail the tenure of teachers as to prevent succeeding administrations from replacing them with other teachers." (Brief, p. 11.) . . .

"**The [school] board has no power to make contracts for the employment of teachers to extend beyond the ensuing school year. . . . A new contract must be made each year with such teachers as it desires to retain in its employ. . . . The board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all.**" (Brief, p. 12.)

We present the foregoing Incident without further comment; since we believe the rule of *res ipsa loquitur* clearly applies to it.

IV.

A CLASSIC CASE ON ACADEMIC TENURE LAW.

It will be remembered that the famous Dartmouth College Case (17 U. S. 518, 4 Wheat. 518) grew out of a set of facts not un-related to the facts in the case at bar. The Trustees of Dartmouth College refused to abide by the original Charter of the College and attempted to depose the President of the College together with certain of the Professors. The Trustees attempted to justify their action by setting up an Act of the New Hamshire Legislature which had authorized such action. The Superior Court of New Hampshire upheld the Trustees. The case came before this Court in 1819, by Writ of Error. John Marshall and his associates reversed the State Court, and upheld the President and the Professors of the College in their contracts with the School.

Since Counsel have challenged our right to have this Court pass upon this case, we think the *Dartmouth College* case is pertinent to our Reply Brief. Reduced to first principles both that case and the case at bar involved impairment of contracts of college teachers. The contracts have merely been impaired in different ways; but a Fedfedal Question is equally involved in both cases.

In his successful argument to the Court, Daniel Webster discussed matters very pertinent to the case at bar when he said in that historic case:

> "The Professors . . . are appointed by the Trustees and are removable by them. Both President and Professors have freeholds in their offices. . . . Nothing could have been less expected in this age, than that there should be an attempt . . . to take away these College livings, the moderate but the only support of literary men who have devoted their lives to the instruction of youth. . . . No description of private property has been regarded as more sacred than College livings. They are the estates and freeholds of a most deserving class of men. . . . Whether to dispossess and oust them; to deprive them of their office,

> and turn them out of their livings: . . . Whether all this be not in the highest degree an indefensible and arbitrary proceeding; is a question of which there would seem but one side fit for a lawyer or a scholar to espouse."

Webster may have made greater orations than his argument in this case; but even that is doubtful. Certain it is, that in all his long career as an Advocate in Court, he never made a *sounder legal argument* than that above quoted. It is an argument that applies forcibly to the case at bar. And with that argument we submit our cause to the Court.

We again urge that the Writ of Certiorari be granted in this case.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Petitioners.

APPENDIX

GEORGE F. BARRETT
ATTORNEY GENERAL
STATE OF ILLINOIS

Springfield
April 27, 1942

Honorable Ivan J. Hutchens, State's Attorney, Macon County,
Decatur, Illinois

Dear Sir:

I have your letter of April 14, 1942, wherein you state, in part, as follows:

"We have an inquiry from the School Directors of one of our School Districts as to whether or not the School Board may properly provide in a contract hiring teachers for next year that by mutual consent of the teachers and the School Board, the services of such teachers are to be for a term of one year only, and at the end of the year the contract hiring the teacher shall terminate. * * *"

I assume that the contract suggested has to do with teachers who will have completed their two year probationary period and who come under the provisions of the Teachers' Tenure Law. The Teachers' Tenure Law is found in Illinois Revised Statutes 1941, chapter 122, paragraph 136c, and provides, in part, as follows:

"* * * Whenever any teacher shall have been employed in any district as a full time teacher for a probationary period of two consecutive years, one of which shall be subsequent to the date that this Act shall take effect, such teacher shall enter upon contractual continued service unless given written notice of dismissal, stating the specific reason therefor, by registered mail by the employing board at least sixty days before the end of such probationary period; * * *

"Such contractual continued service shall continue in effect the terms and provisions of the contract with the teacher during the last year of such probationary period, subject to the provisions of this Act and the lawful regulations of the employing board, and nothing herein contained shall be construed as modifying any existing power of the board except with respect to the procedure on the discharge of a teacher and reductions in salary as hereinafter provided. * * *"

You will note from the above statutory provisions that the contract of a teacher during the second probationary year is continued in force and no further contract is required under the Act.

A very good statement, by our Supreme Court, on statutory construction is found in the recent case of *Scott* v. *Freeport Motor Casualty Co.*, 379 Ill. 155, where, on pages 161 and 162, the Court said:

"* * * The primary object in construing a statute, is to ascertain the legislative intent expressed therein. (*People* v. *Illinois Merchants Trust Co.*, 328 Ill. 223; *American Aberdeen-Angus Breeders' Ass'n* v.

Fullerton, 325 id. 323; *Barnes* v. *City of Chicago*, 232 id. 203; *State* v. *Brush*, 318 id. 307.) In seeking the legislative intent, courts should consider the language used, the object to be attained, or the evil to be remedied, and this may involve more than the literal meaning of the words used. (*Peabody* v. *Russell*, 301 Ill. 439.) When the words used, followed literally, lead to an absurd consequence or to a construction clearly not contemplated, this constitutes a sufficient reason to depart from the language used for the purpose of ascertaining the intent. (*Mitchell* v. *Lowden*, 288 Ill. 327.) A thing which is within the intention of a statute is within the statute, although not within its letter, and a thing within the letter is not within the statute unless it is within the intention. (*Peabody* v. *Russell*, *supra*.) Statutes must be so construed as to be given a reasonable construction, if possible. (*Friend* v. *Borrenpohl*, 329 Ill. 528; *Galpin* v. *City of Chicago*, 249 id. 554.) A statute, if possible, must be construed so as to give effect to all its provisions. (*People* v. *Price*, 257 Ill. 587.) In whatever language a statute may be expressed, it must be given a practical and common sense construction. (*People* v. *New York, Chicago and St. Louis Railroad Co.*, 353 Ill. 518.) The intention of the lawmakers, in passing a statute, is to be found and given effect if not in violation of the constitution. (*Illinois Bell Telephone Co.* v. *Ames*, 364 Ill. 362.) It is a well known rule of statutory construction, that a statute must be interpreted according to the legislative intention, and not always according to the literal meaning of the language used. *People* v. *Lieber*, 357 Ill. 423. * * *"

From a reading and study of the Teachers' Tenure Act [Laws Illinois, 1941, p. . . ; Ill. Rev. Stat. Chap. 122, Sec. 136c] it is clear that the intention of the Legislature was to provide qualified, industrious and conscientious school teachers, who have served the probationary statutory period of two years, with security of position, in which they have already demonstrated their ability to fill in an efficient and satisfactory manner. Having attained this security of position, it would be an absurd construction to hold that a school board could take from the teachers this right by requiring another contract which would be good for only one year.

The Act does provide a method for removing an unfit teacher however. It does eliminate the possibility of a good teacher losing his or her position for personal, trivial, inconsequential, whimsical or political reasons.

I am, therefore, of the opinion that after a teacher completes the two year probationary period and comes under the provisions of said Act no further contract is required of the teacher, and that a contract for one year, as suggested, would be invalid for the reasons herein stated.

Yours very truly,

GEORGE F. BARRETT
Attorney General.